No. 02-1741

IN THE

Supreme Court of the United States

REGINA D. MCKNIGHT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent chiefly (1) argues that the construction imposed on § 16-3-85 by the South Carolina Supreme Court majority was not so novel or indefensible as to deny McKnight Due Process and (2) emphasizes that the large majority of South Carolina stillbirths (*i.e.*, those where use of illicit drugs is not suspected) continue to be treated by prosecutors as "trag[edies]" (Opp.9), rather than homicides.

Respondent's efforts to minimize the legal and practical significance of the decision below are powerfully refuted by the submission of the American Public Health Association and 26 other organizations, and as we explain below, neither the Opposition's defense of the merits of the decision below, nor its recurring, but desultory, assertions that federal constitutional questions are not properly presented – warrants denying review.

A. The Case Raises Broadly Important Due Process Questions Warranting This Court's Review

1. Without denying that § 16-3-85 had never before been interpreted to authorize punishment of a woman who suffers a stillbirth, on the theory that fetal demise was her "fault" (Opp.9), Respondent maintains that prior South Carolina decisions interpreting the terms "person" and "child" in particular statutes to include a viable fetus (Opp.10-11), render the construction below "[]expected and []defensible."

a. Respondent almost entirely avoids what should be central in the Due Process analysis: the patent implausibility that the State Legislature intended its 1992 enactment to punish women who suffer stillbirths linked to drug use during pregnancy. Sustaining application of the statute – which passed unanimously – required the court below to assume: (1) that *every* legislator who voted against other, less draconian measures proposed to address drug use by pregnant women (*see* Pet.14), nonetheless voted to punish (as homicide) drug ingestion resulting in a stillbirth; and (2) that the Legislature enacted two laws addressing fetal demise resulting from drug ingestion late in pregnancy: one,

§ 44-41-80, which punishes doing so with *specific intent* as a misdemeanor, and a second, § 16-3-85, which (without mentioning pregnancy, fetuses or drugs) makes similar action, when resulting in *unintended* pregnancy loss, punishable by life imprisonment.

i. The generic proposition that proposed legislation can fail for "myriad * * * reasons" (Opp.14 n.13) is no answer here. The point is not only that these many proposals were voted down, but that the same legislators who led the opposition – and left no doubt that they saw a punitive approach as inimical to public health, unanimously supported § 16-3-85.[1]

ii. The incompatibility of the decision below with the abortion statute cannot be defended as a "legislative determination" (Opp.17 n.16) that the offense with which Petitioner was charged is "more serious," *id.*, than that punished under § 44-41-80(b). There is no evidence of any such determination, and no known penological theory supports punishing the same harm-causing activity far *more harshly* if the result was *un*intended. *See Enmund v. Florida*, 458 U.S. 782, 800 (1982).[2]

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[1]Respondent (Opp.13-14) directs the Court to the Legislature's "failure," *id.*, to more explicitly disavow the *Whitner* decision when it amended § 16-3-85 in 2000. Those developments have no relevance to the Due Process question, *see Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), but they may not, in any event, be construed as expressing *approval* of *Whitner*. The Legislature *deleted* from § 16-3-85 a cross-reference to the statutory provision construed in *Whitner*, and in the course of considering the amendment, legislators clarified that the statute "pertained" only when "a child is * * * already born." Tr. Debate on H.3555, Judiciary Committee of the South Carolina House of Representatives at 5 (Feb. 8, 2000) (Rep. Jennings) (unofficial transcript from audiotape obtained from Clerk of House of Representatives).

[2]The suggestion that "the issue of whether the existence of the abortion statute somehow deprived McKnight of notice," Opp.15, has been waived slices Petitioner's constitutional rights far too thinly. The claim – made by Petitioner at every level – is that the application of § 16-3-85 to her case was "unexpected and indefensible." As in *Bouie*, the existence of

b. The South Carolina Supreme Court's decisions in *Horne, Whitner* and *Ard* obviously do not provide "clear and unequivocal notice that a woman commits homicide" when a stillbirth is linked to drug ingestion while pregnant. Opp.16. *Whitner* was not a homicide case – the decision arose from an attempt to withdraw a misdemeanor guilty plea – and neither *Ard* nor *Horne* addressed a *pregnant woman's* causing fetal demise, let alone her doing so, unintentionally, "by ingesting crack cocaine" *See Ard*, 332 S.C. at 374 (defendant shot pregnant victim in the forehead, having previously expressed an intention to kill); *Horne*, 282 S.C. at 446 (defendant, intending to kill estranged wife, stabbed her in neck and abdomen, causing demise of near-term fetus).[3]

c. Previous South Carolina cases had stressed that decisions whether to construe the term "child" or "person" as encompassing fetuses must be made in the context of the particular statute at issue. *See Whitner*, 328 S.C. at 6 ("The

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a different statute "dealing specifically," 378 U.S. at 359 n.7, with maternal responsibility for late-term fetal demise renders the construction imposed below "all the more untenable," *id.* *See also* Pet App. 21a (Moore, J., dissenting) (citing statute as evidence that Legislature could not "could not have * * * intended" to prosecute a woman for causing fetal demise); *cf. Elder v. Holloway*, 510 U.S. 510 (1994).

At all events, defense counsel *did* call the specific statutory provision to the trial court's attention more than once, *see* Pet.7 n.4, including during an omnibus argument on Petitioner's pretrial motions. *See Ford v. Georgia*, 498 U.S. 411, 418 (1989).

The precedents the State identifies as barring the Due Process argument, *see* Br. Opp.15 (citing *Durley v. Mayo*, 351 U.S. 277 (1956), and *Stembridge v. Georgia*, 343 U.S. 541 (1952)), have no application to this case. They involve the presumption against jurisdiction in cases "[w]here the highest court of the state *delivers no opinion* and it appears that the judgment might have rested upon a nonfederal ground," *id.* at 547 (emphasis added); *compare Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

[3] *Bouie* and progeny settle that notice that activity is prohibited, *e.g.*, that drug use was "already illegal," does not in itself satisfy Due Process. *See, e.g., Douglas v. Buder*, 412 U.S. 430 (1973) (*per curiam*); *BMW v. Gore*, 517 U.S. 559, 574 (1996) (fairness"dictate[s] "that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that State may impose").

question * * * is whether a viable fetus is a 'person' *for purposes of the Children's Code*") (emphasis added); *id.* at 21 (Finney, C.J., dissenting) (noting recent decision construing "child" to mean "child in being and not a fetus").[4]

d. The distinction Respondent (and the State Supreme Court majority) would brush aside – between fetal demise that results from a third party's attack on a pregnant woman and that which ensues from a woman's activity during pregnancy – is one with deep roots in the Anglo-American legal tradition, *see Wyoming v. Osmus*, 276 P.2d 469 (1954), and it remains broadly and consistently adhered to, *see, Florida v. Ashley*, 701 So. 2d 338 (1997) (collecting cases from 21 States); *see Bouie*, 378 U.S. at 361 (South Carolina Supreme Court's enlargement of trespassing statute was "inconsistent" with "traditional American law").

Courts throughout the Nation – with bodies of precedent fundamentally similar to the South Carolina case law cited by Respondent – have held that the leap from third-party liability for fetal harm to *maternal* liability for activity during pregnancy is unwarranted and/or impermissible, as a matter of Due Process. *See* Pet.15 (discussing *Ashley*, *Collins v. Texas,* 890 S.W.2d 893 (App. 1994), and *Stallman v. Youngquist,* 531 N.E.2d 355 (Ill. 1988)).

The traditional distinction is one the *South Carolina Legislature* adheres to. Thus, § 44-41-80 prescribes a heavier penalty for a third party who "administers a drug" with the intent of causing fetal demise late in pregnancy, *see id.* § (a), than for a woman who self-administers the same drug for the same purpose and with the same result, *id.* § (b).

2. The Petition and *Amicus* Brief explain that the range of activity that can give rise to punishment under the construction adopted below is vast – and the seeming terms

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[4]The court in *Horne* invoked its "right and * * * duty to develop the *common law* of South Carolina," 282 S.C. at 447 (emphasis added), to fashion a crime of "feticide" – and *reversed* the conviction, because no prior "South Carolina decision had held that killing of a viable human being *in utero* could constitute a criminal homicide," *id.* (citing *Bouie*).

of limitation, "public knowledge" of "potential" to cause fetal demise, are so imprecise as to supply no meaningful guidance at all. As a result, prosecutors (and, in practice, health care providers) are vested with authority to determine which stillbirths the law will treat as "tragic" (Opp.9) and which ones will be investigated or punished as homicides.

Respondent's principal answer (Opp.19 n.18), that prosecutions have not targeted stillbirths linked to the full range of "potentially fatal" pregnancy activity – *i.e.*, that "the parade of horribles" has "not materialized" – simply misses the Due Process point.

a. Vagueness analysis looks to the *statute* – as authoritatively construed by the State Supreme Court, *see Kolender v. Lawson*, 461 U.S. 352, 355 n.4 (1983) – not to predictions or assurances as to how it will be enforced. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 63 (1999) ("That the police have adopted internal rules limiting their enforcement to certain designated areas would not provide a defense to a loiterer * * * arrested elsewhere").

The opinion below did not (and could not) decide that the homicide law reaches *only* fetal harm that results from ingestion of "already illegal" substances. Pet.App.14a. Instead, as now construed, the statute targets any harm-causing "act or omission," 16-3-85(B)(1), whose "potential[]" to result in pregnancy loss is a matter of "public knowledge." Indeed, the decision expressly identifies "failing to supply the child with adequate health care" – an omission that has nothing to do with drug use – as a provision that "may clearly be applied to an unborn child." Pet.App.9a.

b. The open-endedness of the statute, as construed, is not of Petitioner's hypothesizing. The Chief Prosecutor for the county from which this case arose publicly warned that homicide charges would be filed "[e]ven if a legal substance is used," *see* Pet. 27, and, when the matter arose at oral argument in the State Supreme Court, Respondent's stance was hardly unequivocal:

The Court: Well who doesn't know cigarettes can cause

> harm to a fetus * * * ? That's pretty common knowledge too, isn't it?
>
> A: It is, and I, but the case may be that the court, the state could under certain circumstances prosecute someone.
>
> The Court: So we are going there.
>
> A: I think each case depends on its own merit, depends upon the facts of the case, depends the level of callousness, the level of recklessness. But I don't think this court even has to go there. You look at the facts of this case and the facts of this case are quite strong.

Tr. Oral Arg. (Nov. 6, 2002) (from official audiotape).

c. Respondent (Opp.20) faults the petition for overlooking that punishment is limited to activity that causes "actual harm," *i.e.*, stillbirth, rather than that which had the "potential" to lead to pregnancy loss.[5] To be sure, this "limitation" reduces the absolute number of women who ultimately could be prosecuted, *see* R. 305 (acknowledging that babies are born alive with twice the amount of cocaine derivative found in Petitioner's stillborn fetus), but it does not mitigate the statute's *vagueness* problem in the least.[6]

The focus on "potential" to harm derives directly from the opinion below, which holds homicide prosecution *in the event of a stillbirth*, to be permissible, whenever it results from acts (or omissions) "publicly know[n]" to be "potentially fatal" to a fetus. The Due Process problem relates to the basic indeterminacy of those terms. Medical experts *do not* accept that cocaine ingestion is more "potentially fatal" or its dangers, more "publicly known," than other activities. *See*

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[5]Respondent's emphasis on causation as a limitation is not without irony, given the grave doubts, *see* Amicus Br. 11-14, about the "expert" testimony linking the pregnancy loss in this case to cocaine.

[6]*Cf. Reinesto v Superior Court*, 894 P.2d 733, 736 (Ariz. App. 1995) (if statute were extended "to prenatal conduct that affects a fetus in a manner apparent after birth – conduct that would be defined solely in terms of its impact on the victim – the boundaries of proscribed conduct would become impermissibly broad and ill-defined").

Amicus Br.15-16; Campaign for Tobacco-Free Kids, *Harm Caused by Pregnant Women Smoking* ("Smoking during pregnancy creates a more serious risk of spontaneous abortion * * * than using cocaine during pregnancy") (http://tobaccofreekids.org/research/factsheets/pdf/0007.pdf).

d. Respondent (Opp.21) would distinguish this case from *Morales*, on the ground that § 16-3-85 imposes a *mens rea* requirement (*i.e.*, "extreme indifference to human life") – a feature that can check arbitrary enforcement of vaguely-worded statutes. But as the petition explains (*id.* 18-20), the majority opinion's unprecedented interpretation of the "extreme indifference" language actually *worsens* the Due Process violation. Of the many decisions – from around the Nation – interpreting this commonly occurring statutory language, none has ever equated "extreme indifference" with activity that is merely "potentially fatal." *See* Pet.19 (citing cases requiring "exceptionally high" risk of death).[7]

e. As explained in the petition, assurances that prosecutors will not enforce the judicially-enlarged statute against many women whose stillbirths result from activities no less "potentially fatal" than Petitioner's are not a basis for *sustaining* it. A central constitutional defect of vague laws is that they "authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56.

An approach that distinguishes between homicidal and "innocent" stillbirth based on the *means* by which fetal demise was caused has no support in the statutory text or even in the State Court's construction. § 16-3-85 surely would apply no differently to a parent's abusing a toddler with his or her fists than to harm inflicted with an implement or substance that happened to violate some other

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[7]Respondent's waiver argument (Opp.18 n.17) rests on a misunderstanding: petitioner does not contend that "the *statutory language* is unconstitutionally vague," *id.* (emphasis added), but rather that the construction imposed *for the first time by the State Supreme Court* was unforeseeable. *See Bouie*, 378 U.S. at 352 (when uncertainty "is * * * not revealed until the court's decision," the violation can be "that much greater"); *cf. Osborne v. Ohio*, 495 U.S. 103, 124 (1990).

provision of positive law.

f. Respondent's attack on Petitioner's standing to raise vagueness objections (Opp.18-19) is irreconcilable with principles laid down in *Kolender* and *Morales*, and the assertion that Petitioner is a "hard core" violator (Opp.18) of the *Homicide By Child Abuse* statute is simply baffling.[8]

§ 16-3-85 is not directed at drug use, nor (to say the least) are women's activities while pregnant its prime focus. As explained above, the legislators who enacted the statute could not have *contemplated* its applying *at all* in a case like this one, *see* Pet.App.21a (Moore, J., dissenting), and many opposed – as overly punitive – far less draconian approaches.

If there *were* a statute addressing women's pregnancy-endangering activities, this case, which involves activity that (as an objective matter) does not pose an unusually high risk, *see* Amicus Br.16 – and specific causation evidence that is, at best, gossamer, *id.* – by an individual who had no intent to harm, would *still not* implicate its "hard core."[9]

3. Even as it faults Petitioner for "bring[ing] the abortion controversy into this case," Opp. 21, and professes umbrage at her describing the decision below as authorizing "regulation of pregnant women," (*id.*9), the Brief in

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[8]Although Respondent argues, inventively, that Petitioner did not adequately preserve an "arbitrary enforcement" vagueness claim (Opp. 20), "the vagueness that causes notice to be inadequate is the very same vagueness that causes 'too much discretion' to be lodged in the enforcing officer." *Morales*, 527 U.S. at 95 (Scalia, J., dissenting). To the extent that *Durley v. Mayo* – the case Respondent cites as imposing an obligation to present the "*particular* federal issue," Opp. 20 (emphasis added) – addresses the requisite level of particularity, it is to precisely the opposite effect, *rejecting* arguments that the petitioner's failure to set forth "federal questions * * * as clearly as [he] might" have, 351 U.S. at 282, was reason to not entertain them.

[9]The description of Petitioner as ingesting cocaine "to induce her own personal euphoria" (Opp. 16) is not well taken: the State's experts made a clinical diagnosis of cocaine dependency, R. 406, and, as noted in the petition, treatment opportunities for someone in Ms. McKnight's position (homeless and pregnant) were, as a practical matter, nonexistent. Pet. 25 n.18 (noting estimated 100 treatment beds for 50,000 women in need).

Opposition claims a State power to impose "duties and obligations" on pregnant women (*id.*22), and cites this Court's abortion precedents *id.* (citing *Roe v. Wade*), as establishing this power to "step in" (*id.* 23) – and punish women, for homicide – in cases where "duties" are breached.

a. The cited cases establish no such State power. While recognizing a governmental interest "in potential life" strong enough to "regulate and even proscribe abortion," at fetal viability, *see Planned Parenthood v. Casey* 505 U.S. 833, 879 (1992) (though even that power must yield to a pregnant woman's health needs, *id.*), these precedents supply no general authority for imposing "duties" on pregnant women, for the benefit of "future children."

The controlling opinion in *Casey* rejected as plainly *un*constitutional a hypothetical law requiring that a woman *notify* her husband – whose "interest * * * in the growth and development of the fetus [the woman] is carrying," *see* 505 U.S. at 895, is surely as compelling as the State's – "before drinking alcohol or smoking" or "engaging in conduct causing risks to the fetus," *id.* at 898. *See also Stallman*, 531 N.E.2d at 359 (rejecting tort of maternal prenatal negligence). The principles that make civil liability – and even notification requirements – impermissible obviously limit a State's power to"step in," through imposition of heavy *criminal* punishment.

b. That Petitioner has "no fundamental right * * * to use crack cocaine" has no more bearing on the constitutional question than does the fact that the hypothetical "pregnant wife" in *Casey* would have no "right" to consume alcohol. McKnight was not punished under a statute prohibiting drug use. It is *Respondent*'s contention that she was convicted for breaching "duties" that arise from her "conscious decision to carry her [pregnancy] to term," Opp.22, and *Casey* leaves no doubt that government impositions on the exercise of that fundamental right must be subject to searching constitutional scrutiny, 505 U.S. at 859.[10]

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[10]While making a token effort to contest the judgment of the American

B. Petitioner's Cruel And Unusual Punishment Claim Warrants Review

1. Respondent's main answer to the claim that McKnight's long prison term, for the unprecedented offense of causing her own pregnancy loss, violates the Eighth Amendment is that her sentence is not disproportionate to ones imposed elsewhere for "murder." (Opp.28). But that begs the constitutional question. *See Enmund*, 458 U.S. at 798 (issue "is not the disproportionality of death as a penalty for murder, but rather [its] validity [as] punishment for [defendant's] own conduct").

2. The deference recognized in *Ewing v. California*, 123 S. Ct. 1149 (2003), provides no basis for sustaining Petitioner's punishment. As *every other* State court of last resort to confront a similar case has recognized, *see* Pet.16, respect for legislative judgment – and Due Process – provide reason for *refusing* statutory enlargements like the one here.

The South Carolina *Legislature* did not decide to punish activity that *un*intentionally results in fetal demise vastly more harshly than that which does so purposefully; nor did that body resolve to abolish the venerable distinction between maternal and third-party liability. And, claims of acquiescence, *see supra* n.1, notwithstanding, the State Legislature's record respecting measures similar to – but far less extreme than – the one judicially imposed in this case has been one of consistent rejection.

* * * * *

For the reasons stated herein, as well as those in the petition and *Amicus* Brief, certiorari should be granted.

Medical Association, the American Public Health Association, the March of Dimes, and the American Society of Addiction Medicine (among many others), that the State Court's rules "harm * * * the cause of prenatal health," *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.23 (2001), *see* Opp.23 n.22 (citing contrary views of three law review commentators), Respondent does not even purport to show that the stillbirth-as-homicide regime is closely tailored to its claimed "compelling interest." Of course, the policy judgment Respondent accuses Petitioner of seeking to overturn (Opp.23) is not one ever made by South Carolina *Legislature*.

Respectfully submitted,

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